No. 75-579

In the Supreme Court of the United States

OCTOBER TERM 1975

ANTHONY ESPOSITO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER

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I.

The Potential Importance Of The Crimaldi Admissions Was Sufficiently "Flagged"

The government says that since the defendant knew of Crimaldi's reputation as a juice loan enforcer, his attorney's formal pre-trial request for evidence favorable to the defendant was insufficient to compel the government to disclose that its principal witness had confessed to a life of unprosecuted crimes. Otherwise, hints the Solicitor General, a clever defendant could deliberately fail to follow a lead which "might have led to disclosure" of this explosive evidence and thereby win himself a second trial by "discovering" it later. (Govt. Br. 12-13)

That argument is wrong. Non-disclosure benefited the prosecution, not the defense. No experienced defense attorney would forego the use of this kind of devastating

impeachment of the principal prosecution witness on the hope that he could "find" it later and then be afforded "a second chance." The only reason the evidence came to light at all is because, after the conclusion of the trial, the witness Crimaldi chose to divulge his sordid life story to a newspaper reporter, who then serialized it in a ten part "Portrait of a Hit Man." (N.T.Ex. 1133-1167).*

The government says that the defense should have "made a specific request to the prosecutors for information in their possession concerning the prior criminal activity of Crimaldi" and that "such a request would have flagged for the prosecution the potential importance of the information to the defense." (Govt. Br. 12-13)

There may be certain types of information for which the "flagging the potential importance" test suggested by the Solicitor General** makes sense. There is other evidence, the importance of which, by the very nature of the information itself, is obvious to the prosecution even without a defense request. We submit that a litany of confessions of unprosecuted crime by the government's star witness falls in the latter rather than the former category.***

In the present case, the potential importance of Crimaldi's admissions could not have escaped the notice of the prosecution. In fact, the prosecutor who tried the case was briefed by the BNDD agents concerning Crimaldi's admissions *for the express purpose* of being advised of facts

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* "Tr. ....." refers to the transcript of Esposito's trial; "H. ....." refers to the May 21-22, 1974 hearings on Esposito's Motion For New Trial. "N.T.Ex. . . ." refers to the Exhibit to Motion for New Trial.

** Such a test is suggested by the government both in this case and in its brief in *United States* v. *Agurs,* No. 75-491, at p. 29.

*** Confessions of unprosecuted crime by prosecution witnesses, as well as records of their criminal convictions, ought be made available as a matter of routine in federal criminal cases.

which might be brought out on Crimaldi's direct or cross-examination (H. 71, 76-79).* The defense attorney's questioning of Crimaldi, and of Agent Haight concerning Crimaldi, could leave no doubt in any listener's mind that he considered Crimaldi's other criminality and possible motivation to aid the prosecution as important. (Tr. 105-107, 174-176)

We think it is significant that in the hearing on the motion for new trial, the prosecutor offered *no explanation* for his failure to disclose the Crimaldi admissions to Esposito's trial counsel. Nor did he deny the agents' testimony that he had been briefed concerning Crimaldi's admissions immediately prior to trial.

II.

The Reasons For Granting Certiorari In Agurs Apply More Forcefully Here

The government concedes that its argument in the instant case parallels its argument in *United States* v. *Agurs,* No. 75-491, and suggests that the Court may wish to defer disposition of the *Esposito* petition pending its decision in *Agurs.* (Govt. Br. 13, 18-19)

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* The testimony of Agent Braseth at the hearing on the motion for new trial concerning the purpose of his briefing of the prosecutor as to Crimaldi's admissions is as follows (H. 78-79):

"THE COURT: Was the purpose of those particular conversations to advise the Government as to what kind of a witness they would have on their hands?

"THE WITNESS: Yes, sir, that is part of it.

"THE COURT: And to perhaps apprise them of what might come out on cross examination or what they might want to bring out on direct?

"THE WITNESS: Yes, sir.

"THE COURT: That was the general purpose of giving information other than the Esposito information?

"THE WITNESS: That is correct."

We agree that the cases are similar. The principal difference is that in *Esposito* there is even more reason for the intervention of this Court than is true in *Agurs*.

In *Agurs,* both prosecutor and defense counsel shared the belief that the undisclosed information was not admissible. (Govt. brief in *Agurs* at p. 6) This was not the case in *Esposito,* in which defense counsel was not aware of the information.

In *Agurs,* the defense made no pretrial request for production of exculpatory information. (Govt. brief in *Agurs* at p. 5 n. 2.) In *Esposito,* the defense made the request, but the prosecution failed to honor it.

In *Agurs,* the defense attorney had been put on notice that the decedent probably had a criminal record but did not request that it be produced. (Govt. brief in *Agurs* at pp. 4-5.) Whatever defense counsel in *Esposito* may have heard concerning Crimaldi's reputation, he had no way of knowing that Crimaldi had confessed to a large number of crimes for which he was not prosecuted.

We submit, in short, that none of the excuses offered by the government for its non-disclosure in *Agurs* (Govt. brief in *Agurs* at p. 32) can justify its stoney silence in *Esposito* with respect to the Crimaldi impeachment.

III.

The Prosecution Took Advantage Of The Non-Disclosure

As we point out in our Petition (pp. 15-16), the prosecution in *Esposito,* unlike *Agurs,* exacerbated its non-disclosure concerning Crimaldi by permitting its witness Agent Haight to falsely deny his knowledge of Crimaldi's juice loan activities and by arguing to the jury that Crimaldi was a reformed youthful criminal with no motive to lie.

The government, in its response (Govt. Br. 18), makes a feeble attempt to rehabilitate Agent Haight (despite his own later admission that his trial testimony was in error), by parsing the questions and his answers and by attempting to show that the answers may have been literally true. Bearing in mind that Agent Haight was the very person who had conducted a debriefing of Crimaldi on his juice loan activities and immediately before the Esposito trial had listened to the Crimaldi tape recording (H. 113-120; H. Ex. 1L-1N), the Court can draw its own conclusions as to whether Agent Haight's testimony* was candid; the prosecutor sat silently through that testimony, making no effort to correct it.

Conclusion

For the reasons set forth in our initial petition as well as those relied on by the Court in granting certiorari in the *Agurs* case, we respectfully urge that this Court grant certiorari to review the judgment of the Seventh Circuit in this case.

Respectfully submitted,

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* Set forth in the footnote on page 3 of Respondent's brief herein.